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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 400

CHARLESTON FEDERAL & SAVINGS LOAN ASSOCIATION, FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, WEST VIRGINIA BUILDING & LOAN ASSOCIATION, and EMPIRE FEDERAL SAVINGS & LOAN ASSOCIATION, *Appellants,*

vs.

GEORGE P. ALDERSON, State Tax Commissioner of West Virginia, *Appellee.*

PETITION FOR REHEARING

KOONTZ & KOONTZ, J. CAMPBELL PALMER, III,
Counsel for Appellants.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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vs.) Appeal from the Supreme Court of
) Appeals of the State of West Virginia.
)

GEORGE P. ALDERSON, State Tax Commissioner of West Virginia.

PETITION FOR REHEARING

Come now the petitioners and respectfully move the Court for a rehearing in the above case, on the ground that the Court apparently overlooked certain pertinent facts which are herein below set out, and that a more complete reading of the evidence contained in the record, indicates that these petitioners, upon such facts, should prevail in this case.

Apparently the sole turning point in the case is whether there was sufficient evidence in the record to show conclusively that petitioners were discriminated against in the assessment of their intangible property for taxation.

With all due deference to the Court, and with the utmost respect for the Chief Justice who rendered the opinion, we respectfully submit that a full reading of the record, with which counsel for petitioners is undoubtedly more familiar than is the Court, will tend to contradict certain statements of fact set forth in the Court's opinion, and will, we submit, conclusively show discrimination against the petitioners.

With the law as set forth by the Court, we are in full agreement, including the proposition that the burden of proof is upon petitioners to show that they were discriminated against.

The first error of fact is found on page 5 of the printed opinion of this Court, in the center of the middle paragraph. The Court has there stated that the Assessor "valued * * bonds * * at about 70% of their face value * *." From a casual reading of the record, that statement is undoubtedly true, as shown on pages 57-58 of the record. However, such testimony was later corrected by the Assessor (R. 144), at which page it is shown he was asked, on cross-examination, substantially the question as set forth in the opinion, namely, whether he had earlier testified that "you assessed bonds and notes at 70% of face value." The witness then made the answer which we believe is one of the turning points of this case, in which he said (R. 144):

> "If I said face value *I meant to say market value* in the case of bonds. I have reference to bonds of private corporations, not United States bonds."*

He then went on to describe (R. 144-5) how he ascertained that market value, and in instances where it was difficult to ascertain, would even make inquiries of prominent financial institutions, such as the Chase National Bank

*All emphasis herein is by counsel.

of New York City, and in one instance had done so for 1941 assessment purposes.

Therefore, this testimony being entirely uncontradicted, all bonds of private corporations, meaning all bonds taxable in West Virginia, were taxed at 70% of their market value, regardless of whether they were owned by banks, building and loan associations, private individuals, or anyone else, so far as the record discloses.

Also, so far as the record discloses, and particularly as shown at R. 57, all notes, regardless of how sound the security behind them might be, were taxed at 70% of face value. In West Virginia what are usually known as mortgages are notes supported by deeds of trust. Therefore, all notes secured by deeds of trust were valued at 70% of face value, without regard to the soundness of the security.

We, therefore, submit that the opinion of this Court was not based soundly on the evidence when it held that, as below quoted, the allowance of such discounts to other taxpayers did not in fact result in actual assessments of intangible property on less than true value.

The principal reason for filing this petition for rehearing, as well as our original reason for bringing this case before this Court, and in fact the crux of the entire case lies in that part of the Court's opinion at the start of the last paragraph on Page 7.

> "As we have said, the state court *concluded* that the discount from face value allowed in assessing Class I intangibles of various taxpayers, other than appellants, was for the purpose of arriving at the true value of the property assessed. In view of that conclusion and in the absence of any finding or *persuasive evidence to the contrary*, we cannot say that the allowance of the discounts has in fact

> resulted in the actual assessment of the intangibles of taxpayers, other than appellants, at less than their true value."

This Court apparently based its holding on that part of the opinion of the West Virginia Supreme Court which it quoted on page 6 of its opinion, as follows:

> "We do not have a case where the true or actual value was ascertained and a discount allowed from that value; but rather a case where the discount was allowed, particularly as to intangibles, in an effort to reach the true value."

We agree that the West Virginia Supreme Court did so find and did so conclude, but that is the very thing which we are and have been complaining to this Court, that such conclusion was not based upon, and was unwarranted, by the evidence in the record in this case.

We hereinafter set forth portions of the record which we believe will conclusively prove to this Court that the assessor of Kanawha County in making the asessments of taxpayers other than these petitioners, first attempted to ascertain the true and actual value of the property of such other taxpayers, as nearly as that could be done, and then either took 70% thereof, or allowed a minimum discount of 30% therefrom, to arrive at assessed values; that because he did this he, therefore, intended to take a 30% discount from the true and actual value of petitioners' intangible properties, to equalize their assessments with those of such other taxpayers, but was forbidden so to do by the Tax Commissioner.

We respectfully submit that if the record evidence which we set forth below sustains this contention of ours, that we are not only entitled to a rehearing, but to have judgment in our favor in the case; of course, if the record

evidence fails to sustain our contention, undoubtedly this Court was correct in its opinion.

The Assessor, when asked how he intended to fix the assessment, under the statute, of building and loan associations, answered (R. 123):

> "Well, I would take the investment shares and investment account, figure their undivided profits and probably their reserves for contingency, and *allow 30% discount as an equalization factor to other classes of property and other properties in the same classification.*"

This next statement, we believe, is entirely contradictory of that which the Court has held, in that, at R. 133, on cross-examination of the assessor, he was asked:

> "Mr. Wilkinson, I believe you have previously testified that your practice in Kanawha County was to assess property in general, with the exception of money, *at about 70% of its actual value*, or to allow a discount of approximately 30%, is that correct?"

and his answer was:

> "For *intangibles*, yes, sir."

As above quoted, both the cross-examiner for the State of West Virginia and the Assessor took it that the Assessor was assessing intangible property at 70% of *actual value* or allowing a 30% discount from true and actual value, and the assessor stated emphatically this was true in fixing the assessment for intangible property.

Again, at R. 144, on cross-examination, the assessor was asked:

> "Now, Mr. Wilkinson, in testifying that you assess different classes of property at various *per-*

centages of the *true and actual value*, is it not necessary first to establish the true and accurate value of such properties in order to determine the true and actual value at which you state you assess them?

"A. We attempt to establish the cost price and then to establish our assessment value accordingly.

"Q. It is necessary then to establish your true and actual value *first*, is it not, or what you consider as a proper value?

"A. I will say 'a proper value', yes."

In other words, as to all other intangible property the assessor FIRST established a true and actual value, from which a 30% discount was given, or 70% of that true and actual value was taken for assessment purposes.

We respectfully submit, with all due humility, that the Supreme Court of Appeals of West Virginia has at no place cited a single incident in the record to support the conclusion to the contrary which it reached, and with all further due humility, this Court has not cited a single incident in the record which would support its sustaining of the Supreme Court of Appeals of West Virginia in the making of the above quoted statement.

And we do respectfully submit that the evidence is overwhelming that the Supreme Court of Appeals of West Virginia erred in its conclusion that the discount allowed was merely one method of trying to find true and actual value of properties of which we complain.

The Supreme Court of Appeals of West Virginia quoted from page 57 of the record as hereinabove set forth, and apparently overlooked the fact that at R. 144, the Assessor had stated he was in error in what he earlier said, and that he was using *market value* and NOT *face*

value of bonds as the figures from which he deducted the 30% discount.

The Supreme Court of Appeals of West Virginia, at S. J. 42, futher stated in its opinion:

> "When we come to assessment of notes and accounts, we think it clear, from the testimony of the deputy assessor, that what is done is assess them at sixty-five to seventy per cent of their face value as reported to the assessor."

At S. J. 45, the Supreme Court of Appeals of West Virginia held with regard to this:

> "The more or less *arbitrary allowance* of the discount as to notes and accounts may have been an erroneous exercise of the duties of the assessor. *We think it was.*"

We ask this court to note that it is not stated that the Assessor erred in the making of assessments, which he may do without creating discrimination, but that the Court stated he erred in the "exercise of the *duties* of the assessor", thus doing that which was forbidden him to do, and thereby creating the very discrimination of which we complain.

True that Court then stated that the assessor was attempting to adopt in good faith a plan or formula to arrive at true and actual value, rather than taking a discount from actual value to arrive at assessed value, but the evidence entirely fails to support that Court's supposition, but wholly supports the position of the petitioner to the contrary.

On direct examination, (R. 70-71) the assessor was asked if *all* of the assessors in West Virginia did not have an annual meeting which the Tax Commissioner himself attended, and at which agreements were made concerning

how assessments should be made in the various counties. Following his affirmative answer, he was then asked:

> "Q. In those conferences have you discussed ways and means of arriving at the assessed valuation by fixing *some percentage of the true and actual value* of what the value might be if sold upon the market voluntarily?
>
> "A. Yes, sir.
>
> "Q. Will you state for the record the nature of these discussions as between the assessors upon that practice of using a percentage of market valuation upon a voluntary sale?
>
> "A. In assessing various classes of properties we have agreed several years ago to use certain percentages of the inventory values or cost values or the book values of certain properties. For instance, inventories, merchandise, stocks, fixtures, machinery and equipment, we agreed to assess at 60%, and various classes of notes from 65 to 80% *of their value.* In fact the instructions we had on the front of Form 3-C were used by the majority of the assessors until those instructions were taken off during the past year by the Tax Commissioner's office."

Form 3-C is Wilkinson's Exhibit No. 2 (R. 228-229), which we will shortly discuss.

At R. 143, on cross-examination, the assessor was asked:

> "I believe you testified that the valuation in various districts ranged from 25% *of the true and actual value* to 80% in other districts, is that correct?
>
> "A. I was referring to the economic conditions at this particular time."

At R. 147, the Assessor was asked, in part:

> "I will ask you to state whether or not the Tax Commissioner's Office has ever instructed the assessors to assess any property at any percentage of the true and actual value.
>
> "A. Yes."

That which indicates conclusively to us that the assessor was allowing everyone else a 30% discount from true and actual value in order to arrive at assessed values, and had so intended to allow such discount to these petitioners until he received instructions to the contrary from the Tax Commissioner, is found at R. 51, where, in answer to a question as to what would have been the proper assessed value of the property of these petitioners, the assessor answered:

> "I believe the return with the addition of the reserves less the 30% discount would be the more equitable assessment."

Again, at R. 149, he was asked, in part:

> "I will ask you how you determined that when, according to your testimony, you had not examined the returns, or at least the returns of some of these associations, for the year 1941?

and he answered:

> "Because it has been *our regular procedure*, and we have attempted to adhere in our business in having *uniformity* between building and loan companies, small loan companies, wholesale houses, garages, grocery stores, hotels, insurance agencies and various other offices and *business of all kinds.*"

and was shortly thereafter asked (R. 149):

> "How would you go about making assessments against the property of these institutions from which you did not have returns?"

and answered:

> "I had intended to use the sheets as provided by the Tax Commissioner's office with *our usual 30% discount.*"

Again, at R. 71-72, the assessor was asked:

> "As a result of your conferences of the 55 assessors of West Virginia and the representatives of the State Tax Commissioner's office, what would you say as to the common practice in West Virginia in arriving at the assessed valuation if the percentage of the market value is taken in arriving at that valuation?"

and answered:

> "From discussions with other assessors I am of the opinion that the majority of the assessments *on all classes of property* is less than the true and actual value."

At R. 73, the assessor stated that if he had not received "specific instructions from the State Tax Commissioner's office, and thereby arrived at a different figure of valuation for these companies", their present assessment as made by him would have been approximately 30% less than the assessments the Tax Commissioner required him to make. This we contend, is positive proof that the discrimination by the Tax Commissioner, was wilful and intentional.

At R. 96 and 100, as well as at other places in the record, it is shown by testimony of officers of these petitioners that they took the 30% discount in filing their returns

for assessment purposes because other organizations and other types of property were being given this same 30% discount from true and actual value of those properties, and this testimony is likewise uncontradicted.

The Form 3-C, heretofore referred to as "Wilkinson's Exhibit No. 10 (R. 227) contained written instructions from the Tax Commissioner's office for the year 1940, (not the year 1941 herein involved), wherein he instructed the various assessors, with the following admonition:

> "The Assessor will find true and actual values, but the following may be used as guides for ascertaining value."

with reference to "Notes Receivable Secured,"

> "If interest bearing, report 85% of face value, and if non-interest bearing notes, report 80% of face value."

and with reference to "Notes Receivable—Unsecured:"

> "Deduct from total, amount of reserve for bad notes and report 80% of remainder if interest bearing and 75% if non-interest bearing."

We believe this Court, in its statement on page 6 of its opinion, has misconstrued the argument made by these petitioners. The Court states, in substance, that our argument was that we were denied equal protection of the laws by proving the assessor discriminated in his mode of assessment of the same kind of Class I property belonging to different taxpayers. May we respectfully advise the Court that this was not our argument. Our argument was that the assessor used only one method of making assessments,—that is, that he found as accurately as he could the true and actual value of all prop-

erties in the county, and then took varying discounts, with a minimum discount of 30%, from that true and actual value, to arrive at the assessed value of properties of all other taxpayers but these petitioners.

In view of the evidence which we have hereinabove cited from the record itself, we respectfully but firmly submit that the opinion of this Court to the effect that there was an absence of any finding or persuasive evidence to sustain our contentions is not well taken. On the contrary, we submit the evidence is conclusive that all other taxpayers were given a minimum discount of 30% from the true and actual values of their properties for assessment purposes, and particularly intangible properties which was denied these petitioners, and that this was done unwillingly by the assessor but at the express orders of the Tax Commissioner and was, therefore, intentional as well as discriminatory.

Finally, we respectfully submit that this Court either overlooked or did not give sufficient attention to the findings and holdings of the fact-finding body in this case, the County Court of Kanawha County, West Virginia. That Court, as shown at R. 43, which heard the witnesses in evidence, and which by statute sits as the Board of Equalization and Review, and being composed of lay persons, presumably knows the true and actual values, as well as assessed values, of all properties in Kanawha County, or the county in which it is sitting, and after hearing the evidence, it held (R. 43) that the instant assessments were excessive and that the petitioners' properties in question "*are at a proportionately higher assessment valuation than the properties of other property owners in Kanawha County, and are discriminatory and not uniform and equal.*" This is the sole finding of fact by any properly constituted fact-finding body, and we submit the conclusions to the contrary reached by the

Supreme Court of Appeals of West Virginia, particularly where those conclusions are contrary to the evidence, should not be sustained by this Court, but that the findings by the County Court should be sustained.

The statute creating the County Court as the Board of Review and Equalization, cited in the Appendix, being Section 24 of Article 3, Chapter 11, Code of West Virginia, provides for the sitting of the County Court as such a board, and that they "shall correct all errors * * in the * * valuation of property, and they shall cause to be done whatever else may be necessary to make the valuation comply with the following provisions of this chapter."

Following the adoption of the constitutional amendment, known as the "Tax Limitation Amendment", which divided the properties in West Virginia into four classes, this present Section 24 was enacted by the Legislature to provide for this review and fact finding by the County Courts.

CONCLUSION

Therefore, in view of that which we have heretofore stated, we respectfully suggest to this Court that if it will again review the record and the facts stated therein, rather than relying solely on the conclusions reached by the Supreme Court of Appeals of West Virginia, from whose decision the appeal was taken, it will ascertain that these petitioners *have proven by the record itself and the facts therein contained,* that they were actually discriminated against, and that such discrimination was made by the Assessor, over his protest, only because he was ordered so to do by the Tax Commissioner of West Virginia; and if this Court find that these petitioners have been discriminated against, we respectfully ask, in the alternative, either a rehearing of the case, or an affirmation of the judgment of the County Court of Ka-

nawha County, and a reversal of the judgment of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

KOONTZ & KOONTZ, J. CAMPBELL PALMER, III,

Counsel for Appellants.

APPENDIX

Code of West Virginia, 11-3-24:

> Review and Equalization by County Court.—The county court shall annually, not later than the fifth day of July, meet for the purpose of reviewing and equalizing the assessment made by the assessor. It shall not adjourn for longer than three days at a time until this work is completed, and shall not remain in session for a longer period than twenty-five days. At the first meeting, the assessor shall submit the property books for the current year, which shall be complete in every particular, except that the levies shall not be extended. The assessor and his assistants shall attend and render every assistance possible in connection with the value of property assessed by them. The court shall proceed to examine and review the property books, and shall add on the books the names of persons, the value of personal property and the description and value of real estate liable to assessment which was omitted by the assessor. They shall correct all errors in the names of persons, in the description and valuation of property, and they shall cause to be done whatever else may be necessary to make the valuation comply with the provisions of this chapter.

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for the purpose of delay.

J. CAMPBELL PALMER, III.

SUPREME COURT OF THE UNITED STATES.

No. 400.—October Term, 1944.

Charleston Federal Savings & Loan Association, First Federal Savings & Loan Association, West Virginia Building & Loan Association and Empire Federal Savings & Loan Association, Appellants,

vs.

George P. Alderson, State Tax Commissioner of West Virginia.

Appeal from the Supreme Court of Appeals of the State of West Virginia.

[February 26, 1945.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question is whether the tax officials of West Virginia, who have assessed appellants' property for state taxation at its full value, have denied to appellants the equal protection of the laws, guaranteed by the Fourteenth Amendment, by their mode of valuation, for taxation, of property of the same class belonging to other taxpayers.

Appellants are three Federal Savings and Loan Associations, organized under federal laws, and one Building and Loan Association, organized under state laws. They filed petitions with the county court of Kanawha County, West Virginia, seeking a review and reduction of the 1941 assessment of their property for taxation by the county assessor. They alleged that their property was assessed at a proportionately higher assessment valuation than the property of other taxpayers and that such assessment was unequal and discriminatory, in contravention of the state constitution and the Fourteenth Amendment to the federal Constitution.

The county court, sitting as a Board of Review, reduced the assessments after a hearing. On appeal the Circuit Court for Kanawha County reversed the determination of the county court, and reestablished the assessments. The Supreme Court of Appeals of West Virginia, the highest court of the state, affirmed, — W.

Va. —, 30 S. E. 2d 513, holding that appellants had failed to make such a clear showing of the unequal effect of the tax as to justify their complaint.

The case comes here on appeal from the judgment of the Supreme Court of Appeals of West Virginia, purporting to have been taken under § 237(a) of the Judicial Code as amended, 28 U. S. C. § 344(a), which authorizes an appeal from the "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, . . . , and the decision is in favor of its validity." In their protests against the assessments, filed with the county court, appellants did not draw in question the validity of any statute. They alleged only that the assessments were not uniform and equal with the assessments of other property owners and that they violated the Fourteenth Amendment. And in their petition for appeal to the Supreme Court of Appeals of West Virginia appellants contended only that the assessments denied to them equal protection of the laws in violation of the Fourteenth Amendment.

It is essential to our jurisdiction on appeal under § 237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws. *Loeber* v. *Schroeder*, 149 U. S. 580, 585; *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153-4; *Fullerton* v. *Texas*, 196 U. S. 192, 193; *Corkran Oil Co.* v. *Arnaudet*, 199 U. S. 182, 193; *Wall* v. *Chesapeake & Ohio Ry. Co.*, 256 U. S. 125, 126; *Citizens National Bank* v. *Durr*, 257 U. S. 99, 106; *Thornton* v. *Mississippi*, No. 401, 1944 term; *Carter* v. *General American Life Ins. Co.*, No. 461, 1944 term; *Putzier* v. *Richardson*, No. 585, 1944 term. And it has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal under § 237(a). *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1; *Citizens National Bank* v. *Durr*, *supra*; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization*, 287 U. S. 573; *Miller* v. *Board of County Comm'rs*, 290 U. S. 586; *Baltimore National Bank* v. *State Tax Comm'n*, 296 U. S. 538; *Irvine* v. *Spaeth*, 314 U. S. 575; *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 650; *Commercial Credit Co.* v. *O'Brien*, No.

378, 1944 term; see *Ex parte Williams,* 277 U. S. 267, 272; cf. *Reeves* v. *Williamson,* 317 U. S. 593.

Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134; *Chicago, R. I. & P. R. Co.* v. *Perry,* 259 U. S. 548, 551; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 267; *Home Ins. Co.* v. *Dick,* 281 U. S. 397, 407; *Nickey* v. *Mississippi,* 292 U. S. 393, 394; *Whitfield* v. *Ohio,* 297 U. S. 431, 435-6. But it does not appear from the opinion of the Supreme Court of Appeals that a federal question was presented to or considered by that court. While the opinion intimates that appellants' objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the federal Constitution.[1]

Appellants in their assignment of errors in this Court have failed to attack the state statute as repugnant to the Constitution, stating only that the finding and judgment below sustaining the assessment violate the equal protection clause. Even where the

[1] The President of the Supreme Court of Appeals, in allowing the appeal to this Court, wrote a memorandum opinion to the effect that the question of the validity of the statute under the Constitution was raised and decided there. Appellants urge that this indicates that the appeal is proper. While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record, Capital City Dairy v. Ohio, 183 U. S. 238, 244; Marvin v. Trout, 199 U. S. 212, 222-4; Cincinnati Packet Co. v. Bay, 200 U. S. 179, 182; Consolidated Turnpike v. Norfolk, etc. Ry. Co., 228 U. S. 596, 599; Whitney v. California, 274 U. S. 357, 360-2; Honeyman v. Hanan, 300 U. S. 14, 22, a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised. Felix v. Scharnweber, 125 U. S. 54, 59, 60; Henkel v. Cincinnati, 177 U. S. 170; Gulf & Ship Island R. Co. v. Hewes, 183 U. S. 66; Home for Incurables v. New York, 187 U. S. 155, 158; Fullerton v. Texas, 196 U. S. 192, 194; Seaboard Air Line Ry. v. Duvall, 225 U. S. 477, 481; Connecticut General Life Ins. v. Johnson, 296 U. S. 535; Purcell v. New York Central R. Co., 296 U. S. 545; Honeyman v. Hanan, *supra,* 18, and cases cited; Lisenba v. California, 314 U. S. 219. The memorandum of the President of the West Virginia court was not sufficient of itself to establish that appellants attacked a statute below, nor does the record contain any evidence which could be relied upon to show that the validity of a statute was drawn in question.

federal question has been properly raised below, an appeal under § 237(a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here. *Cady* v. *Georgia*, No. 584, 1944 term; cf. *Herbring* v. *Lee*, 280 U. S. 111, 117; *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86, 91; *Flournoy* v. *Wiener*, 321 U. S. 253.

For these reasons we grant appellee's motion to dismiss the appeal. Treating the papers on which the appeal was allowed as a petition for writ of certiorari, as required by § 237(c) of the Judicial Code, as amended, 28 U. S. C. § 344(c), certiorari is granted, since appellants have properly attacked the validity of the assessments under the equal protection clause of the Fourteenth Amendment, and we proceed to consider the merits.

Section 14(a) of Chapter 11, Article III of the West Virginia Code of 1941, provides that "the capital of every building and loan association and federal savings and loan association, as represented or evidenced by the investment shares and investment accounts in such association, shall be assessed at its true and actual value. . . . The real and actual value of such capital, represented by the market value of such investment shares and investment accounts as aforesaid, shall be ascertained according to the best information which the assessor may be able to obtain. . . ."

Section 1 of the same chapter and article provides: "All property shall be assessed annually as of the first day of January at its true and actual value. . . ." And Article 10, § 1 of the Constitution of West Virginia provides: ". . . taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." This section of the constitution also provides for the division of all taxable property into four classes, with a prescribed limitation on the amount of tax which may be levied upon each class. Class 1 consists of "personal property employed exclusively in agriculture, . . . products of agriculture, . . . including livestock, while owned by the producer" and includes "money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property", which is the class of property for which appellants are taxed.

Notwithstanding these provisions of the constitution and statutes of the state, it appears from the evidence, and the state Court of Appeals found, that in 1941, and since, the assessor of Kanawha County, following the instructions of the state tax commissioner, employed a different method in the valuation and assessment of the property of building and loan associations and federal savings and loan associations, including appellants, from that employed in assessing Class I property of other taxpayers. It is this difference in the mode of assessing the property of different taxpayers which petitioners contend has resulted in taxing the property of appellants at its full value and like property of other taxpayers at less than its full valuation, in violation of the equal protection clause.

It appears from the record that the assessor in 1941 for the first time followed the uniform practice of assessing the capital of building and loan associations and federal loan associations as evidenced by their investment shares and investment accounts, constituting their Class I intangibles, at their full value. But it also appears that in assessing other taxpayers on their Class I property, the assessor varied his method of assessment as to different types of property included in the class. As to them he valued money at 100%, bonds, notes and accounts receivable, except installment accounts, at about 70% of their face value and installment accounts at 65% of their face value. Livestock and agricultural products were valued at approximately 50% of their "purchase value". The accounts receivable and notes of small loan companies were assessed at about 85% of their face value. It does not appear how commercial banks and trust companies were assessed, but for purposes of decision the state court assumed that their Class I intangibles were assessed at their full face value.

The Court of Appeals found that small loan companies and other taxpayers whose Class I intangibles were taxed at less than their face value are engaged in a business different from and involving a greater risk than that in which building and loan associations and federal savings and loan associations are engaged. It found that there was a basis for the discount from face value employed in assessing notes and accounts of small loan associations, which was lacking in the assessment of the higher grade securities, held by building and loan associations and federal savings and loan associations, whose investments are generally more

carefully made and better secured than those of other classes of taxpayers.

The court concluded that the method of assessment and valuation employed was not adopted with the purpose of taxing some but not all Class I property at less than its true value, but as a means of arriving at its true value. It said: "We do not have a case where the true and actual value was ascertained and a discount allowed from that value; but rather a case where the discount was allowed, particularly as to intangibles, in an effort to reach the true value". While the court thought that this method of assessment might in some instances be an erroneous performance of the duties of the assessor, it held that a mere error of judgment as to the mode of assessment adopted was not sufficient to establish an unlawful discrimination "where the plan, though imperfect, is adopted in a good faith effort to secure fair and equitable assessment, and equality and uniformity in taxation."

Appellants argue that denial to them of the equal protection of the laws is established by the proof of the assessor's discrimination in his mode of assessment of the same kind of Class I property belonging to different taxpayers, and that this discrimination is shown to be "intentional and systematic". But this argument overlooks the well established rule that the constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class and that mere differences in modes of assessment do not deny equal protection unless they are shown to produce such inequality. *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 236; *Home Ins. Co.* v. *New York,* 134 U. S. 594, 600; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 229; *Michigan Central R. R. Co.* v. *Powers,* 201 U. S. 245, 298-300; cf. *Hendrick* v. *Maryland,* 235 U. S. 610; *Gen. Amer. Tank Car Corp.* v. *Ray,* 270 U. S. 367; *Interstate Buses Corp.* v. *Holyoke Street Ry.,* 273 U. S. 45, 51; *Interstate Buses Corp.* v. *Blodgett,* 276 U. S. 345, 251. Nor does the equal protection clause prohibit inequality in taxation which results from mere mistake or error in judgment of tax officials, *Pittsburgh, etc. Ry. Co.* v. *Backus,* 154 U. S. 421, 435; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 609; *Brooklyn City R. Co.* v. *New York,* 199 U. S. 48, 52; *Sioux City Bridge* v. *Dakota County,* 260 U. S. 441, 447; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519, 527; *Baker* v. *Druesedow,* 263 U. S. 137, 142; *Cumberland Coal Co.* v. *Board,* 284 U. S.

23, 25; *Rowley* v. *Chicago & Northwestern Ry. Co.*, 293 U. S. 102, 111; *Great Northern Ry. Co.* v. *Weeks*, 297 U. S. 135, 139; or which is not shown to be the result of intentional or systematic undervaluation of some but not all of the taxed property in a single class. *New York* v. *Barker*, 179 U. S. 279, 284, 285; *Coulter* v. *Louisville & N. R. Co.*, *supra*; *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353; *Sioux City Bridge* v. *Dakota County*, *supra*, 447; *Southern Ry. Co.* v. *Watts*, *supra*; *Snowden* v. *Hughes*, 321 U. S. 1, 9.

In all these respects appellants have the burden of establishing the unconstitutionality of the assessments which they assail, *Sunday Lake Iron Co.* v. *Wakefield*, *supra*, 353 and cases cited; *Southern Ry. Co.* v. *Watts*, *supra*, 526; *Chicago G. W. Ry.* v. *Kendall*, 266 U. S. 94, 99; *Lawrence v. State Tax Comm'n*, 286 U. S. 276, 284; *Great Northern Ry. Co.* v. *Weeks*, *supra*, 139; *Snowden* v. *Hughes*, *supra*, 9; and they have failed to sustain that burden.

It is plain that the Fourteenth Amendment does not preclude a state from placing notes and receivables in a different class from personal property used in agriculture and the products of agriculture, including livestock, and taxing the two classes differently, even though the state places them in a single class for other purposes of taxation. *Bell's Gap R. Co.* v. *Pennsylvania*, *supra*, 237; *Home Ins. Co.* v. *New York*, *supra*, 606; *Coulter* v. *Louisville & N. R. Co.*, *supra*, 608-9; *Klein* v. *Board of Supervisors*, 282 U. S. 19.

As we have said, the state court concluded that the discount from face value allowed in assessing Class I intangibles of various taxpayers, other than appellants, was for the purpose of arriving at the true value of the property assessed. In view of that conclusion and in the absence of any finding or persuasive evidence to the contrary, we cannot say that the allowance of the discounts has in fact resulted in the actual assessment of the intangibles of taxpayers, other than appellants, at less than their true value. Nor can we say that the discounts which were denied to appellants on their Class I intangibles for the first time in 1941 were intended to produce inequality in taxation, or were part of a systematic effort to accomplish that end, or in fact were more than errors in judgment, if that, in the administration of the tax laws.

We find no persuasive evidence in the record and are pointed to none from which it could be inferred that the value of Class I intangibles of small loan companies and other taxpayers in West Virginia, not subject to the same supervision as appellants, is not generally less than face value, or that the discount allowed by the assessor on the intangibles of any given taxpayer or class of taxpayers has in fact resulted in an assessment at less than their true value. It follows that appellants have failed to sustain the burden of showing that the assessments are unconstitutionally discriminatory, and the judgment must be

Affirmed.

Mr. Justice BLACK is of the opinion that the appeal raises no substantial federal question and therefore concurs in its dismissal. For the same reason he thinks certiorari should be denied.

Mr. Justice ROBERTS.

I am of opinion the judgment should be reversed. I think the evidence is not only without contradiction but is persuasive that persons and corporations whose circumstances are precisely similar to those of the complaining taxpayers, and persons competing in the investment field with them and holding similar security, have been benefited by assessments purposely intended to discriminate in their favor, and against the complainants. I think the decision below plainly runs counter to decisions of this court. *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 245; *Concordia Fire Insurance Co.* v. *Illinois*, 292 U. S. 535.